Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 74-1623

CHESTER SLONE, ET AL ..... APPELLANTS

VS:

DESKINS BRANCH COAL
COMPANY, ET AL ..... APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF KENTUCKY

APPELLANTS REPLY MEMORANDUM TO THE BRIEF OF THE SOLICITOR GENERAL

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MAY IT PLEASE THE COURT:

Appellants respectfully respond to the Memorandum of the Solicitor General by pointing out:

1. The Solicitor General suggests that coal miner's "Black Lung" is different from all other occupational diseases. He would imply that it is not the same disease as pneumoconiosis in other industries. Appellants charge otherwise (J. S., p. 9), and the Congress

agrees.[1] The Secretary of Health, Education and Welfare defines "Black Lung" or "pneumoconiosis" as including silcosis arising from coal mining, a form of pneumoconiosis equally common to sandblasters, quarry workers, road construction workers, brick kiln workers and the like. Federal Register, Vol. 37, No. 191, Part III, §410.110, p. 20635, September 30, 1972. Clearly the term "Black Lung" embraces any pneumoconiosis arising only from coal mining.

2. Appellants charge that pneumoconiosis arising from coal mining is but one form of the same disease identified by occupation. We were prepared to establish by medical evidence that all pneumoconioses in the disabling stage create the same pulmonary dysfunction (retard the intake of oxygen and explusion of carbon dioxide), cause the same physical problems (shortness of breath on exertion, fatigue, chest pain, cough, etc.) and result in the same occupational disability. The problems are the same depending on degree of pulmonary dysfunction regardless of the source of the pneumoconiosis. Appellants were precluded from so establishing when the Court below *sua sponte* dismissed without an opportunity for an evidentiary hearing.

3. The Kentucky Workmen's Compensation Act embraces all forms of disabling pneumoconisosis arising out of employment. (J. S., p. 17, 18) Discrimination against coal miners with pneumoconiosis only on an occupational basis alone is a denial of equal protection *under state law.*

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1. 30 USC § 902 (b) — "The term 'pneumoconiosis' means a chronic dust disease of the lung arising out of employment in a coal mine."

4. The occupational discrimination is pointed up by the recent decision of the Kentucky Court in *Wagoner* v. *Johnson,* No. 75-402 (decided October 17, 1975). There, Johnson worked as a coal miner but his last thirteen (13) years were in the road construction industry. He became disabled as a construction worker on February 5, 1973, from pneumoconiosis. The Floyd Circuit Court held Johnson entitled to the increased benefits of a construction worker. The Kentucky Court of Appeals reversed and held that since the pneumoconiosis developed over his "whole work experience" including his coal mining, he would be relegated to the lesser benefits of a coal miner. Opinions of the Courts are included by appendix.

5. The Solicitor General suggests that Kentucky is merely deferring to the Congress. We disagree because:

(a) The Congressional enactment was a welfare measure, payable out of the public treasury for 1973 claims. It is not ". . . to be considered a workmen's compensation law or plan . . ." 30 USC §922 (b).

(b) The Kentucky Act is a true workmen's compensation plan, designed to compensate for wage loss. KRS 342.620 (9). It is payable solely by the employers and their insurance carriers, not from the public treasury (J. S. p. 11).

(c) The federal act provides only for "total disability", no partial disability payments were authorized. 30 USC §921 (a).

(d) There were no federal benefits for partial disability to defer to. Yet Kentucky denied the increase only to partially disabled coal miners with

pneumoconiosis, granting the increase to all others partially disabled. The coal miner receives his percentage of partial permanent disability on the lesser weekly sum for 400 weeks instead of life. The brick worker, construction worker or other worker with pneumoconiosis receives his percentage of partial permanent disability on the increased benefits for life, with provision for his widow and children.

6. The Solicitor General would suggest decisions such as *Weinberger* v. *Salfi*, No. 74-214, where widows of less than nine (9) months tenure were excluded from Social Security benefits. We suggest the result would have been different if *only widows of coal miners* had received *lesser benefits.*

7. The Solicitor General does not assert the "noncontractual" argument so often asserted in Social Security cases such as *Weinberger* v. *Wiesenfeld*, 419 U. S. 822, decided March 19, 1975. Even so, we suggest that the occupational discrimination here is not far removed from the sexual discrimination there condemned.

8. Unlike *Weinberger* v. *Wiesenfeld*, Supra, the state workmen's compensation benefits in Kentucky are contractual in nature. They stem directly from employment, for the disability must arise therefrom. The quid pro quo for the payment by the employer is the work performed by the workman and his relinquishing his right to sue under the Kentucky Constitution. The "contract" is that the parties will operate under the Kentucky Workmen's Compensation Act rather than the tort law of the Commonwealth. *General Refractories Co.* v. *Henderson*, 313 Ky. 613, 232 S. W. 2d 846, 848 (1950), a brick workers

pneumoconiosis (silicosis) case; *Simmons* v. *Clark Construction Co.*, Ky., 426 S. W. 2d 930, 932 (1968).

9. We suggest that *eligibility to apply* for federal black lung benefits cannot be equated with an *actual award* (J. S., p. 24). We note this Court's decision in *Philbrook* v. *Gladgett*, 421 U. S. 707, decided June 9, 1975. The Kentucky Court's position would have been far more palatable if it had so construed the Kentucky statute involved (quoted, J. S., p. 4, 5). Unfortunately this Court is bound by the Kentucky Court's construction. *Mullaney* v. *Wilbur*, No. 74-13, decided June 9, 1975.

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

FLOYD CIRCUIT COURT

ACTION #10856

GEORGE JOHNSON VS: GREER BROTHERS & YOUNG CONSTRUCTION ET AL.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

* * *

1. The Findings of Fact of the Workmen's Compensation Board are adopted, except for the finding no. 3 that plaintiff was employed as a coal miner at the time he became disabled on or about February 5, 1973.

2. The undisputed testimony at the hearing discloses that the plaintiff has not worked in the coal mines since 1960. Since that time, he worked in the construction industry, drilling into and blasting rock. He continued that work right up to the date of his disability, February 5, 1973, the date of his last injurious exposure. (Transcript of Hearing, pages 4-8)

3. The undisputed evidence is that plaintiff's injurious exposure to silica dust for at least nine (9) years next preceding his disability was in road construction work, and not in the coal mines. His rate of compensation must be based upon disability from construction work, where he received his last injurious exposure.

CONCLUSIONS OF LAW

1. The rights of an occupational disease claimant under Kentucky statute depend upon the date of the last injurious exposure. *Maggard* v. *International*

Harvester Co., Ky., 508 S. W. 2d 777 (1974); *Chapman* v. *Eastern Coal Corporation,* Ky., ____ S.W.2d ____ (rendered February 7, 1975).

2. Plaintiff's last injurious exposure occurred as an employee of the defendant-employer, a construction worker and not a coal miner. Hence, plaintiff is entitled to receive the rate of compensation provided for construction workers and is not limited by *Maggard* and *Chapman* to the rate of compensation awarded by the Board.

3. The Court of Appeals made this clear in *Chapman,* where the Court said, "In short it was determined that the legislative intent was to exclude Black Lung claimants whose last exposure occurred in 1973 from the increase in maximum payments available by virtue of the 1972 Amendment to other workmen who became disabled in 1973." The Court made this even more clear in *Chapman,* when it said: "The goal seems to have been to defer placing an economic burden on the coal industry until it was no longer being carried on other shoulders."

4. In the instant case, plaintiff's last exposure in 1973 was not in the coal mines. Therefore, he was not within the class of workers excluded from increased benefits, that is, coal miners who were last injuriously exposed to coal dust in 1973.

5. The Workmen's Compensation Board clearly erred in not awarding plaintiff the increase in Workmen's Compensation Benefits provided by the 1972 Legislature, and the Opinion and Award will be set aside and the case remanded for entry of an Opinion and Award granting the increased benefits.

JUDGMENT

It is the judgment of this Court that the Opinion and Award rendered November 18, 1974, be and the same is hereby vacated and set aside, and this cause is remanded to the Workmen's Compensation Board with directions to enter an Award in favor of the plaintiff awarding him $81.00 per week commencing February 5, 1973, together with interest at the rate of six percent (6%) per annum on all past due and unpaid installments of such compensation, so long as plaintiff shall remain totally and permanently disabled, subject to a credit for all compensation heretofore paid, to be appropriately apportioned between the employer and the Special Fund; together with all reasonable medical expenses of plaintiff resulting from his disability.

After the time for appeal has expired, the Clerk of this Court is directed to return the record to the Workmen's Compensation Board for appropriate proceedings consistent with this Judgment.

Plaintiff shall recover his costs.

This 28 day of February, 1975.

/s/ Hollie Conley
JUDGE, FLOYD CIRCUIT COURT

* * * * * * *

RENDERED: October 17, 1975

COURT OF APPEALS OF KENTUCKY

No. 75-402

GEORGE R. WAGONER, ET AL. VS: GEORGE JOHNSON, ET AL.

Appeal From Floyd Circuit Court
Honorable Hollie Conley, Judge
Civil Action No. 10895

MEMORANDUM OPINION PER CURIAM

REVERSING

The issue presented is whether a claimant for workmen's compensation benefits for permanent total disability as a result of the disease of pneumoconiosis, whose last injurious exposure was on or subsequent to January 1, 1973, and whose condition was brought about by reason of his whole work experience rather than from any one particular period of employment, is entitled to the benefits as provided by Senate Bill 184, enacted by the 1972 General Assembly.

We have examined the record and are of the opinion that the issue presented herein falls within the rule established by Maggard v. International Harvester Company, Ky., 508 S.W.2d 777; Chapman v. Eastern Coal Corporation, Ky., 519 S.W.2d 390; and Fugate v. United States Steel Corporation, Ky., ____ S.W.2d ____ (rendered May 9, 1975). We are not persuaded to depart from the criteria set forth therein.

The judgment is reversed with directions that a new judgment be entered upholding the award of the board.

* * * * * * *

CERTIFICATE OF SERVICE

I, C. KILMER COMBS, attorney for appellants herein and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 10 day of November, 1975, I served copies of the foregoing Appellants Reply Memorandum to the Brief of the Solicitor General on the several parties thereto, as follows:

1. On James R. Yocom, Commissioner of Labor of Kentucky and Custodian of the Special Fund, by depositing in a United States Post Office three copies in a duly addressed envelope with first class postage prepaid addressed to Cyril E. Shadowen, attorney for the Commissioner of Labor, Department of Labor, Legal Arts Building, 200 South Seventh Street, Louisville, Kentucky 40202, his attorney of record.

2. On Deskins Branch Coal Company; on Kentucky-Elkhorn Coals, Inc.; and on Kentucky Carbon Corporation, individually and as representatives of the class of employers named as appellees in the caption above, by depositing in a United States Post Office three copies thereof in a duly addressed envelope with first class postage prepaid addressed to William J. Baird, Baird and Baird, attorneys, Post Office 351, Pikeville, Kentucky 41501, their attorneys of record.

3. On Shelby T. Denton, Chairman, Alfred A. Naff, George B. Simpson, Clyde Mullins, and Glen Schilling, Members comprising the Workmen's Compensation Board of Kentucky, and Ed E. Hancock, Attorney General of Kentucky, by depositing in a United States Post Office three copies thereof in a duly addressed envelope with first class postage prepaid addressed to Thomas R. Emerson, Assistant Attorney

General, Capitol Building, Frankfort, Kentucky 40601, their attorney of record.

4. On The Honorable Robert H. Bork, Solicitor General of the United States, amicus curiae, by depositing in a United States Post Office three copies in a duly addressed envelope with first class postage prepaid addressed to The Honorable Robert H. Bork, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530.

5. All parties required to be served have been served.

C. KILMER COMBS
Attorney for Appellants